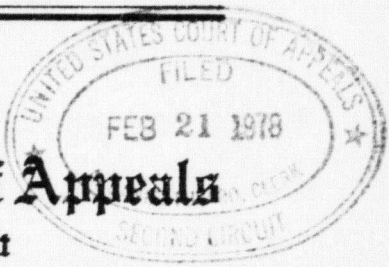
United States Court of Appeals

for the Second Circuit

APPELLANT REPLY BRIEF ON REHEARING EN BANC

No. 76-7631



In the

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ORECK CORPORATION, *Plaintiff-Appellee,* vs. **WHIRLPOOL CORPORATION and SEARS, ROEBUCK AND CO.,** *Defendants-Appellants.*	Appeal from the United States District Court, Southern District of New York. — Honorable **Richard Owen,** Judge Presiding.

B R/S

DEFENDANTS' JOINT REPLY BRIEF ON REHEARING EN BANC

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PRELIMINARY STATEMENT

Defendants will not burden the Court with specific replies to each and every factually incorrect representation and legally untenable argument in the 43 page brief which Oreck now has seen fit to impose upon the Court in addition to the 65 pages contained in its original brief and petition for rehearing. Three short points are dispositive of all of plaintiff's arguments irrespective of the incorrect factual setting in which plaintiff has structured its position:

1. Defendants' alleged conduct, even if it had occurred, was not a *per se* Sherman Act violation.
2. Defendants' alleged conduct, even if it had occurred, would be lawful under the rule of reason because of the continued availability to plaintiff of competitive goods.
3. It was not necessary to object to improper jury instructions to properly appeal from the lower court's erroneous denials of defendants' motions for directed verdict and for judgment n.o.v. and, in any event, the plain error rule is applicable.

ARGUMENT

Oreck's brief on rehearing begins with a 17-page rehash of its twice previously stated argument that it was at Sears' behest that Whirlpool stopped dealing with Oreck. This point was thoroughly briefed before the panel, but was not reached by the majority. Accordingly, defendants continue to stand on their briefs to the panel.[1] Even if there had been an agreement, however, it was neither a *per se* violation nor unlawful under the rule of reason.

Defendants do not dispute the holding of *Ethyl Gasoline Corp.* v. *U. S.*, 309 U. S 436, 457-9, 60 S. Ct. 618, 84 L. Ed. 852 (1940), cited at page 32 of Oreck's brief on rehearing, that an agreement between seller and customer fixing the latter's resale price for goods purchased from the former is *per se* unlawful. But Oreck concedes, also at page 32, that here there was no such agreement to fix anyone's price. Defendants also do not dispute the holding in *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 221, 60 S. Ct. 811, 84 L. Ed. 129 (1940), also cited at page 32 of Oreck's brief on rehearing, that it is *per se* unlawful for a combination to "tamper" with prices by raising, lowering or stabilizing them. But once again Oreck does not contend, as it cannot contend, that its prices were raised, lowered or stabilized as a result of any act of defendants. Here there was no tampering with price just as there was no agreement to fix prices. Hence, neither case is applicable.

In its brief, Oreck contends, at pages 31-3, that it was terminated to discipline it for reducing its prices to levels closer to those charged by Sears when it began to sell by direct mail. It concedes that its prices were always higher than Sears', but claims that because they were "plummeting" it was terminated. Nothing could be further from the truth and Oreck's own evidence refutes this baseless charge.

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1. See pp. 21-26 of defendants' initial brief to the panel and pp. 9-16 of their reply brief to the panel.

The *only* Sears prices in the record (introduced by Oreck itself) were prices from $18 to $24 (PX. 165, Tr. 906 *ff.*, 989-994). In 1965, before Oreck sold by direct mail, it advertised that the public could buy Whirlpool upright vacuum cleaners from its retailer customers for "less than $49.95" (PX. 14, A. 97-8). In 1970, after Oreck changed to mail order distribution (to reduce its price, according to page 31 of its brief), the price the public had to pay for a Whirlpool upright vacuum cleaner "plummeted", to use Oreck's word, from "less than $49.95" in 1965 to $44.75 (PX. 124, A. 619-20). In 1971, this price was increased to $46.80 and $48.60 (PX. 60, A. 394, 725). Seeking to explain away the inconsistency between these facts and its argument that it was terminated because its prices were "plummeting" towards Sears' concededly lower level, Oreck suggests, at pages 12, 31-2 of its brief, that its prices were not comparable to the $18-$24 Sears' prices it introduced because Sears' prices were sale prices. This explanation flies in the teeth of the record. The only evidence of Oreck's prices, again introduced by Oreck itself, revealed that the $44.75 it offered in 1970 and the $46.80 and $48.60 it offered in 1971 were themselves *half*-price specials (PX. 60, 124).

Thus, Oreck could not have been terminated for price cutting. It was not a price cutter.[2] Its prices were always higher, substantially higher than those of Sears.[3] And, clearly, Oreck's prices were not the subject of an agreement, nor were they raised, lowered or stabilized by any act of defendants. Hence, there was no "tampering" or price fixing of any description,

2. As we showed on our opening brief on rehearing, the dissenting opinion repeatedly emphasized the erroneous view that Oreck was punished because it was a price cutter and that as a result the public was charged higher prices. This was, and even Oreck concedes that this was, a mistaken view of the record (Oreck br. on rhrg., p. 31).

3. Oreck's conclusion that its prices were declining stems from two misstatements. At page 12 of its brief, and again at page 32, it confused its cost with its price, by citing Whirlpool's price to it as proof of its price to the public. At page 9, it confused a forecast of what its prices might be in the future for proof of what they actually were.

and the claim that Oreck was terminated to discipline it for price cutting is specious.

Equally untenable is Oreck's claim that it was *per se* unlawful for a single manufacturer, Whirlpool, and a single retailer, Sears, to agree upon an exclusive distributorship. Oreck's invocation of *Klor's* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959) in support of its position is patently at odds with this Court's prior decision, affirming *per curiam* and approving the trial court's reasoning, in *Beckman* v. *Walter Kidde & Co., Inc.*, 316 F. Supp. 1321 (E. D. N. Y. 1970), *aff'd per curiam*, 451 F. 2d 593 (2d Cir. 1971), *cert. denied*, 408 U. S. 922 (1972):

> "He [plaintiff] reads *Klor's* to mean that whenever there is a conspiracy resulting in a refusal to deal, Section 1 is violated. This contention runs counter to all past decisions. Were this not true, all exclusive franchises would be illegal since they are agreements between a manufacturer and a distributor requiring the manufacturer not to sell to other parties. . . . What Beckman failed to perceive is that the *per se* doctrine enunciated in *Klor's* has a limited area of operation. . . . *The Klor's court carefully limited its own reach by the statement that 'this is not a case of a single trader refusing to deal with another, nor even of a manufacturer and a dealer agreeing to an exclusive distributorship.'* Thus treble damage actions predicated on overbroad applications of *Klor's* have been rejected with the explanation that the *'Klor's* case involved a predatory conspiracy with both horizontal and vertical elements directed at a single competitor with the purpose of driving that competitor from the field *by foreclosing all sources of supply.*" 316 F. Supp. at 1327. (Citations omitted, emphasis supplied.)

Another District Judge in this Circuit has explained the inapplicability of *Klor's* to a situation such as in the case at bar as follows:

> "The *Klor's* case aims at *concerted* action by those *on the same competitive level*, and does not reach a vertical agree-

> ment between manufacturer and distributor. . . ." *Potter's P' hic Applications Co.* v. *Ealing Corp.*, 292 F. Supp. 92, 104 (E. D. N. Y. 1968). (Citations omitted, emphasis pplied.)

Nor does *United States* v. *General Motors Corp.*, 384 U. S. 127, 86 S. Ct. 1321, 16 L. Ed. 2d 495 (1966), either hold or suggest that an exclusive distributorship agreement between a single manufacturer and a single dealer is *per se* unlawful. In *General Motors*, Chevrolet dealers in Los Angeles horizontally conspired with one another to prevent sales by any Chevrolet de er to discount houses. It was held *per se* unlawful for General Motors to enforce that horizontal conspiracy among the competing dealers. That this is the teaching of *General Motors* has been made clear by the Supreme Court itself:

> "There is no doubt that restrictions in the latter category [horizontal restrictions originating in agreements among retailers] would be illegal *per se*, see, e.g. *United States* v. *General Motors Corp.*, 384 U.S. 127, 16 L.Ed. 2d 495, 86 S. Ct. 1321 (1966). . . ." *Continental T. V., Inc.* v. *GTE Sylvania, Inc.*, ... U. S. ....., 97 S. Ct. 2549, 53 L. Ed. 2d 568, 585 n. 28 (1977).

Thus it is patent that neither *Klor's* nor *General Motors* supports plaintiff.

The test of legality of an exclusive distributorship agreement between a manufacturer such as Whirlpool and a retailer such as Sears is clearly stated in an unbroken line of decisions[4], cited at pages 5-7 of defendants' opening brief on

4. *Alpha Distributing Co. of California* v. *Jack Daniel Distillery*, 454 F. 2d 442, 452 (9th Cir. 1972); *Elder-Beerman Stores Corp.* v. *Federated Dept. Stores, Inc.*, 459 F. 2d 138, 146 (6th Cir. 1972); *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F. 2d 418, 420 (D. C. Cir. 1957), *cert. denied*, 355 U. S. 822 (1957); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F. 2d 71, 76 (9th Cir. 1969), *cert. denied*, 396 U. S. 1062 (1970); *Bay City-Abrahams Bros., Inc.* v. *Estee Lauder, Inc.*, 375 F. Supp. 1206, 1214-6 (S. D. N. Y. 1974); *Top-All Varieties, Inc.* v. *Hallmark Cards, Inc.*, 301 F. Supp. 703, 704-5 (S. D. N. Y. 1969).

rehearing. All of these cases hold that an exclusive distributorship arrangement between a manufacturer and a customer is not *per se* unlawful, even if an existing customer is terminated and must thereafter obtain a new source of supply. In every case, the customer had requested the exclusive—or even demanded it—to protect itself from the competition of other customers selling goods of the same manufacturer. The courts have consistently held that such arrangements can only be illegal if the terminated customer is foreclosed from *all* sources of supply. This is not the case here.

As the December 31, 1971 expiration date of Oreck's distributorship agreement with Whirlpool approached, Oreck ordered and received from Whirlpool an extraordinarily large quantity of vacuum cleaners (PX. 99).[5] It ordered so many, in fact, that some of them were still in Oreck's inventory two years later, in 1973, by which time Oreck had long since commenced receiving vacuum cleaners from its new supplier (A. 445-447, 887-888). Thus, Oreck at all times remained a viable competitor.

Hence, the panel was right to reverse the judgment against defendants. Whether Oreck was discontinued as the result of unilateral conduct by Whirlpool, as contended by defendants, or as the result of agreement, as contended by plaintiff, is irrelevant under the controlling cases relied on by defendants and the panel majority. The controlling cases hold that the legality of defendants' conduct is to be judged by the availability to Oreck of other merchandise, thereby enabling Oreck to remain a competitor in the sale of vacuum cleaners. By this test, on the uncontroverted and uncontrovertible facts of this record, defendants' conduct was clearly lawful.

Obviously recognizing the applicability of the cases relied upon by defendants and the panel majority, Oreck attempts to avoid their impact on this case by what it characterizes, at page 20 of its brief, as the "commercial reality" of the situation. The

5. For which Oreck refused to pay until Whirlpool's suit for goods sold and delivered was reduced to judgment (A. 442-443).

"commercial reality" rather than supporting plaintiff's position bolsters the position of the defendants and the holding of the majority, for it clearly discloses that trade was not unreasonably restrained in this case. No competitor was eliminated by the conduct of the defendants. Oreck merely substituted its brand for the Whirlpool brand. Oreck continues to compete with Sears, and since Oreck's new supplier had not previously competed in the United States there was in fact a net increase in the number of manufacturers whose vacuum cleaners are sold in the United States. There was no reduction in the number of dealers or the number of brands on the market.[6]

Under these circumstances, further comment concerning Oreck's attempt to distinguish the controlling cases[7] by incorrectly arguing that they merely involved a substitution of one competitor for another,[8] and that the commerical reality of this case is somehow different, would seem unnecessary. Here, the commercial reality is at least the same as in those controlling cases and probably involves a greater degree of competition, so that the cases relied upon by the defendants and the panel majority are clearly dispositive.

By arguing, at page 30 of its brief, that it was not required to prove that the public was injured, Oreck merely seeks to in-

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6. Defendants do not concede the relevance of the number of brands. And as shown on page 4 of defendants' reply brief before the panel there is no significance to the fact that Oreck no longer had the Whirlpool brand.

7. See those cases cited in footnote 4, at page 6 of this brief.

8. See *Packard Motor, supra,* and *E. A. Weinel Construction Co.* v. *Mueller Co.,* 289 F. Supp. 293 (E. D. Ill. 1968), which involved a reduction in the number of dealers, not mere substitution. Ignoring this fact, Oreck mistakenly relies on *Perryton Wholesale, Inc.* v. *Pioneer Distributing Co. of Kansas,* 353 F. 2d 618 (10th Cir. 1965), *cert. denied,* 383 U. S. 945 (1966). In *Craig* v. *Sun Oil Company of Pennsylvania,* 515 F. 2d 221, 223-4 (10th Cir. 1975), *Perryton* was expressly limited to its facts involving common law unfair competition, not even arguably present here. Indeed, the Court noted that *Perryton* was based on two First Circuit decisions which had been overruled and was, in any event, "not necessarily a *per se* case."

ject confusion into this case in an attempt to obscure the fact that it failed in its obligation to prove a violation of law. As has been shown by defendants, their conduct was not unlawful *per se* either as price fixing or as a group boycott, and did not result in an unreasonable restraint of trade. It was therefore clearly lawful. All that this case involves is an alleged agreement between a single manufacturer and a single retailer for an exclusive distributorship. Neither commerical reality, the public interest, nor any other reason suggests this Court should create, as plaintiff apparently seeks, a new rule of *per se* illegality in conflict with the well reasoned prior decisions of the Sixth, Ninth and District of Columbia Circuits in *Elder-Beerman, Alpha Distributing,* and *Packard Motor, supra,* let alone with this Court's prior well reasoned decisions in *Beckman, supra,* and *Bowen* v. *New York News, Inc.,* 522 F. 2d 1242, 1254 (2d Cir. 1975).[9]

Equally without merit is Oreck's argument, at page 39 of its brief, concerning defendants' failure to object to the trial court's instructions of *per se* illegality. Since there is no evidence of any unreasonable restraint of trade under the rule of reason, there was no instruction which could properly have been given, and it was thus error to submit the case to the jury at all. This point was preserved by defendants' motions for directed verdict and for judgment n.o.v., the denials of which were erroneous. *House of Koscot Development Corp.* v. *American Line Cosmetics, Inc.,* 468 F. 2d 64, 65-6 (5th Cir. 1972); *Hanson* v. *Ford Motor Co.,* 278 F. 2d 586, 593 (8th Cir. 1960); *Coca Cola Bottling Co. of Black Hills* v. *Hubbard,* 203 F. 2d 859, 862 (8th Cir. 1953). Moreover, under the circumstances of this case, the "plain error" rule of this Circuit is clearly applicable in any event. *See, Williams* v. *City of New York,* 508 F. 2d 356, 362 (2d Cir. 1974).

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9. Cited at pages 5-6 of defendants' initial brief on rehearing. Also see other cases from these Circuits as well as decisions from the Third and Fifth Circuits and several District Courts cited on pages 16-17 of defendants' opening brief before the panel.

CONCLUSION

For the foregoing reasons, and those set forth in defendants' initial brief on rehearing and its briefs before the panel, the full Court should sustain the decision of the panel reversing the judgment of the trial court, but should decline to order a new trial. The Court should remand this cause to the trial court with directions to enter judgment for defendants.

Respectfully submitted,

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No. 76-7631

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss. A. B Nathan being first duly

sworn, deposes and says that he served two copies of the

Defendants' Joint Reply Brief on Rehearing En Banc

in the above entitled cause, as per statute herein made and provided, on

Law Firm of Malcolm A. Hoffmann
12 East 41st Street
New York, New York 10017

and also filed the required number of copies of the above with the

U. S. Court of Appeals, Second Circuit

this 16th day of February, A. D. 1978

A. B Nathan

Subscribed and sworn to before me this 16th

day of February, A. D. 1978

Bernard S. Dunetz

Notary Public.

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